IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2002 Session

TRUMAN CLOUSE, ET AL. v. MARC FLOYD WHICHER

Appeal from the Chancery Court for White County
No. 9250 Vernon Neal, Chancellor

No. M2001-02745-COA-R3-CV - Filed October 7, 2004

This appeal involves a boundary dispute between neighboring landowners over a strip of land between six and nine feet wide. The parties submitted conflicting surveys in support of their respective claims to the disputed strip, but both agree the original subdivision plat is flawed. In addition, the defendant claims title to the disputed strip based on adverse possession. The trial court set the boundary line in accordance with the defendant's expert's survey and the plaintiffs appealed. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

BEN H. CANTRELL, P.J., M.S., WILLIAM B. CAIN, J., and JOHN H. GASAWAY, III, SP. J., delivered the opinion of the court.

Henry D. Fincher, Cookeville, Tennessee, for the appellants, Truman Clouse and Sue Clouse.

Tom Beesley, Crossville, Tennessee, for the appellee, Marc Floyd Whicher.

MEMORANDUM OPINION[1]

I.

On May 26, 1987, Marc Floyd Whicher purchased Lot 79 in the Thousand Oaks Resort Subdivision in White County, Tennessee. Mr. Whicher's deed describes the property only by reference to the original plat of the subdivision produced in 1968 by surveyor L.B. Petty. The Petty Plat shows that lot 79 has one hundred feet of road frontage.

---

[1] Tenn. Ct. App. R. 10 provides:

> The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Immediately after purchasing lot 79, Mr. Whicher hired Walter Deal, a licenced surveyor, to survey the lot. Mr. Deal's survey shows Lot 79 as having one hundred feet of road frontage and shows an electric pole as the boundary between Lot 79 and Lot 78. Mr. Whicher subsequently built a house centered within the boundary lines shown by the Deal survey. Mr. Whicher did not live in the house, but allowed his mother to live there for several years. The lot was not cleared all the way to the lines shown on the deal survey and a portion of the disputed strip was covered with trees and underbrush until 1998. No fence was erected until 1999.

The plaintiffs, Truman and Sue Clouse, bought Lots 77 and 78 in 1997. Like Mr. Whicher's lot 79, Lot 78 is shown on the Petty Plat as having one hundred feet of road frontage. The Clouses' dispute with Mr. Whicher began in 1998, when the Clouses began clearing their lots, including a portion of the disputed strip, using a bulldozer. Mr. Whicher alleges the original boundary markers were destroyed at this time. In response, Mr. Whicher began constructing a fence just inside the line set by the Deal survey. The Clouses then filed this suit to stop construction of the fence and determine the boundary line.

At trial, Mr. Whicher presented the testimony of William S. Williford, a licenced surveyor and former employee of Mr. Deal. Mr. Williford resurveyed Lot 79 by retracing Mr. Deal's survey and again used the electric pole as the northeast corner of Lot 79. Mr. Williford's survey shows 100' of road frontage for both lots 78 and 79, although Mr. Williford did not measure the actual frontage for lot 78.

The Clouses presented the testimony of their own licenced surveyor, Darrell Johns. Mr. Johns, with the aid of a metal detector, found several 3/4" thick walled iron pipes that Mr. Deal and Mr. Williford had not found. Mr. Johns determined these pipes were the original monuments set out by Mr. Petty in 1968. Four of them he concluded marked the outside corners of lots 78 and 79. He was not, however, able to find any 3/4" thick walled pipe showing the line between lots 78 and 79.

The outside corners of Lots 78 and 79 set by Mr. Johns were slightly different from those set by Mr. Williford. In addition, Mr. Johns determined that there was a discrepancy between the distances on the Petty plat and those on the ground. He determined that there was only 196.54 feet between the outside northern corners of lots 78 and 79 rather than the 200ft shown on the Petty plat. He then set the line between lots 78 and 79 by apportioning the 3.46 feet of shortfall between the two lots.

In addition to asserting that Mr. Williford's survey accurately depicts the parties' common boundary, Mr. Whicher claimed that he is entitled to the disputed strip based on the doctrine of adverse possession. In support of his claim, he testified that he put septic lines on part of the disputed strip ten years earlier and had mowed the strip three to five time per year.

The trial court determined that the boundary between lot 78 and lot 79 should be set in accordance with the Williford Survey. The Clouses filed a motion to alter or amend or, in the alternative, for a new trial requesting in part that the trial court grant a new trial to consider the testimony of additional witnesses to refute Mr. Whicher's claim of adverse possession. The trial court denied the motion, and the Clouses filed a timely notice of appeal to this court.

II.

The Clouses raise six issues on appeal. Two issues concern the actual location of the parties' boundary lines pursuant to their deeds and which of the two competing surveys accurately depicts that line: (1) whether the trial court erred by not applying the doctrine of apportionment and (2) whether the trial court erred by giving precedence to an adjoining landowner's line over an existing artificial monument. The remaining four issues relate to Mr. Whicher's claim of adverse possession. We need address the issue of adverse possession only if we first determine that legal title to the disputed strip lies with the Clouses rather than Mr. Whicher .[2] We turn first therefore to the question of where the actual boundary lies under the parties' deeds.

This case essentially presents a choice between two competing surveys. Because this is an appeal from a decision made by the trial court following a bench trial, the standard of review set forth in Tenn. R. App. P. 13(d) applies. Our review of the trial court's factual findings is thus de novo upon the record, with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d 566, 569 (Tenn. 2002). We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997). The presumption of correctness requires us to accept the trial court's findings of fact unless the aggregate weight of the evidence demonstrated that a finding of fact other than the one found by the trial court is more probably true. *Estate of Haynes v. Braden*, 835 S.W.2d 19, 20 (Tenn. Ct. App. 1992). Questions of law receive plenary review. *Malone & Hyde Food Servs. v. Parson*, 642 S.W.2d 157, 159 (Tenn. Ct. App. 1982).

A trial court's determination of a real property boundary line is a factual determination, rather than a legal one. *Mix v. Miller*, 27 S.W.3d 508, 514 (Tenn. Ct. App. 1999); *Taylor v. Carlin*, No. W2003-00640-COA-R3-CV, 2004 WL 367699 (Tenn. Ct. App. 2004) (Tenn. R. App. P. 11 application filed April 23, 2004). Thus, where the trial court, as the finder of fact, is required to chose between two competing surveys, we must presume that the trial court's decision is correct unless the evidence preponderates otherwise. *Stovall v. Bagsby*, No. M2002-01901-COA-R3-CV, 2003 WL 22768677 (Tenn. Ct. App. Nov 24, 2003) (No Tenn. R. App. P. 11 application filed). *Horne v. Warmath*, No. 02A01-9509-CH-00201, 1996 WL 465549 (Tenn. App. Aug.16, 1996) (Tenn. R. App. P. 11 application denied Jan. 6, 1997).

After carefully reviewing the record in this case, we conclude that the evidence does not preponderate against the trial court's decision to adopt the boundary line set forth in the Williford survey. Neither surveyor located an original marker for the boundary in dispute and neither could match the original Petty plat exactly. However, we conclude that the Williford survey more accurately reflects the true boundary between the parties as set forth in the parties' deeds and the original Petty plat.

---

[2] Adverse possession of real estate is a possession thereof inconsistent with the right of the true owner, and when such possession is accompanied by certain acts and circumstances, the title will vest in the possessor. *Michael v.. Jakes*, No. M1999-02257-COA-R3-CV, 2002 WL 1484448 (Tenn. Ct. App., July 12, 2002) (Tenn. R. App. P. 11 application denied Dec. 2, 2002). If Mr. Whicher is the "true owner" owner of the disputed strip, then there is no need for his adverse possession claim.

> The general rule is that in determining boundaries resort is to be had, first, to natural objects or landmarks, because of their very permanent character, next, to artificial monuments or markers, then to boundary lines of adjacent owners, and then to courses and distances. But this general rule, as to the relative importance of these guides to the ascertainment of a boundary of land, is not an inflexible or absolute one. The use of the rule is as a means to the discovery of the intention of the parties. To arrive at the intention of the parties to the instrument is the purpose of all rules of construction, and this applies to the description of premises conveyed as well as to other parts of the instrument.

Pritchard v. Rebori, 135 Tenn. 328, 332-333, 186 S.W. 121, 122 (Tenn. 1916).

The primary and fundamental rule to which all others relate and must yield is that the intention of the parties gathered from the whole instrument, taken in connection with surrounding circumstances must control. *Morgan v. Good*, No. M2001-00683-COA-R3-CV, 2002 WL 2008801 (Tenn. Ct. App. Sept. 3, 2002).

Both surveyors agree that the Petty plat is flawed and that a shortfall exists. Mr. Johns testified that the shortfall is on lot 78 and 79 and apportioned the shortfall between those two lots. He admits, however, that he did not survey the whole street and did not know if there is "ground"for everyone to have what they bought based on the original plat. He conceded his survey was a best "guestimate," that he tried to create a line that was equitable and fair to both parties, and that another surveyor might chose a different line.

Mr. Williford, on the other hand, concluded that the shortfall is actually in the curve on lot 77, because the original Petty Plat contains no curve data. He testified that, absent curve data, it is impossible to accurately determine the frontage of lot 77. He also testified that apportionment of the shortfall would require resetting the boundaries of every lot on the street. In addition, Mr. Williford's survey comports with the accepted boundary between lot 79 and lot 80.

As the trial court acknowledged, "there are facts and circumstances that would support the conclusion reached by both surveyors." However, the evidence does not preponderate against the trial court's selection of boundary line in Mr. Williford's survey. Because the Williford survey more accurately reflects the parties' true boundary, we need not address Mr. Whicher's adverse possession claim. Accordingly, the Clouses' remaining issues related to the adverse possession claim are pretermitted.

III.

We affirm the judgment of the trial court and remand the case to the trial court for such further proceedings as may be necessary. We also tax the costs of the appeal to Truman and Sue Clouse and their surety for which execution, if necessary, may issue.

PER CURIAM